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# IN THE COURT OF APPEALS OF INDIANA

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| IN RE THE VISITATION OF: | ) | |
| | ) | |
| M.S. and K.S. | ) | |
| Grandchildren, | ) | |
| | ) | No. 29A05-0606-CV-322 |
| By Next Best Friend | ) | |
| BEVERLY R. NEWMAN, | ) | |
| | ) | |
| Appellant-Petitioner. | ) | |

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steve David, Special Judge
Cause No. 29D03-0501-DR-002

**January 24, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Judge**

As the trial court noted in its order denying Newman's petition for court-ordered grandparent visitation time, this case "is a soap opera." Appellant's App. p. 27. And it's a bad soap opera at that. Appellant-petitioner Beverly R. Newman has a daughter, Julie Sondhelm, who has two children—ten-year-old M.S. and eight-year-old K.S.—that are the subject of this action. Newman filed a petition with the trial court requesting court-ordered grandparent visitation time with M.S. and K.S., which the trial court denied. On appeal, Newman raises six issues, which we restate as: (1) whether the trial court violated Newman's freedom of speech, free exercise of religion, and freedom of association; (2) whether the trial court improperly took judicial notice of three matters; (3) whether the trial court's findings of fact were supported by evidence and its decision was in the best interests of M.S. and K.S.; (4) whether the trial court erred when it quashed four testimony subpoenas and admitted two exhibits over Newman's objections; (5) whether an ex parte communication between Sondhelm and the trial court prior to in camera interviews with M.S. and K.S. prejudiced Newman; and (6) whether the trial court was biased against Newman.

On cross-appeal, Sondhelm argues that the trial court erred by not awarding her attorney's fees. Sondhelm also requests that we award her appellate attorney's fees pursuant to Indiana Appellate Rule 66(E).

For the reasons elaborated upon below, we affirm the trial court's order denying Newman court-ordered grandparent visitation time with M.S. and K.S. Regarding attorney's fees, we find that the trial court did not err when it denied Sondhelm's request because Indiana Code section 31-17-7-1 does not apply and the trial court did not find that Newman

acted in a vexatious nature. We also decline Sondhelm's request for appellate attorney's fees.

## FACTS

For more than two decades, Newman and Sondhelm have had an extremely tumultuous mother-daughter relationship that has only occasionally been cordial. Newman married Lawrence Newman[1] in 1987, seventeen years after Sondhelm was born. In May 1993, Sondhelm married Shahram Shirazi, a man of Iranian-Persian descent. Newman did not attend the wedding ceremony, and Sondhelm and Newman's relationship was very limited throughout Sondhelm and Shirazi's marriage. Sondhelm gave birth to M.S. on October 17, 1996, and K.S. on September 25, 1998. Newman was not present during M.S.'s birth but was in the hospital parking lot during K.S.'s birth. Despite Sondhelm's repeated requests for Newman to call K.S. by his first name, Newman has referred to K.S. as "Danny" since his birth because, as she testified, it is "his middle name, his Hebrew name . . . ." Tr. p. 202.

In August 1999, Sondhelm and Shirazi separated. Newman called Sondhelm and the two met to discuss Newman's desire to spend time with Sondhelm, M.S., and K.S. Sondhelm cautiously agreed to resume a relationship with Newman and to bring the children to visit Newman once a month. Eventually, visitation became more frequent and Newman began to visit her grandchildren three or four times a week. On occasion, Sondhelm would attempt to limit Newman's contact by telling her that she needed to have her own "family

[1] We note that Lawrence was Newman's legal counsel at the trial court level and also represents her on appeal.

time" with M.S. and K.S but Newman would "show up anyway." Id. at 63. In December 2000, Sondhelm met Jeff Sondhelm (Jeff) and the two began dating.

As time went on, Sondhelm became concerned with Newman's anxieties and actions and their impact on her children. After September 11, 2001, Newman believed that the end of the world was coming, began to gather supplies, and insisted on keeping copies of the children's birth certificates and passports as a precaution. Newman also began expressing her concerns over health-related issues and told the children that there were poisons in non-organic food and that they should not walk on grass because of pesticides.

In March 2002, Jeff moved into Sondhelm's home, and the two became engaged in August 2002. After the engagement, Sondhelm became more concerned about Newman's behavior because she would be disrespectful to Jeff in front of M.S. and K.S. Newman became angry when Sondhelm suggested that things "cool down for a little bit." Id. at 343. At that point, Newman started "calling non-stop to [Sondhelm's] house and work . . . ." Id. at 344. Newman left notes in Sondhelm's vehicle, one of which read, "May God wreck [sic] a vengeance upon you," and notes in the children's car seats that read "[I]f you need help, call Grandma[,]" with Newman's phone number in large numbers. Id. at 352.

Sondhelm and Jeff married on March 15, 2003. Newman did not participate in the planning of the wedding, did not attend the rehearsal dinner, and did not RSVP. However, Newman showed up the day of the ceremony and was "very disruptive." Id. at 354. Sondhelm and Jeff have had two children since their marriage.

Things between Newman, Sondhelm, and Jeff soon reached a breaking point. In the spring of 2004, Newman waited outside of Sondhelm's work. When Sondhelm and K.S.

arrived, Newman waved a piece of paper at Sondhelm and said, "I have evidence against you, and I'm going to use it against you." Id. at 355. Sondhelm kept walking because she "didn't feel it was appropriate for [five-year-old K.S.] to hear" these things, and she told Newman that she would pursue a protective order if Newman continued to harass her. Id. at 355-56.

Later that year, Sondhelm contacted the Jewish Community Center (JCC) and asked that her mother be banned from events involving M.S. and K.S. because Newman was not a member of the JCC and was a disruption to Sondhelm's family. During a May 2005 art show in which K.S. was participating, Newman stood outside the JCC for five hours with a large sign that read "JCC bans Grandma from Daled art show." Respondent Ex. D; Tr. p. 356.

Newman has also made unflattering allegations against Julie and Jeff. In May 2004, Newman sent a fax titled "Employee Grievance" to Sondhelm's work in which Newman relayed "inappropriate conduct" by Sondhelm and Jeff following a soccer practice where she accused Jeff of "physical assault" and asked Sondhelm's employer to "advise [Sondhelm] that she is not to argue with [Newman] in front of any child, not to defame or harass [Newman], and not to condone any physical assault enacted by her husband." Respondent Ex. E. Newman later filed for a protective order against Jeff, and the Marion County Superior Court issued a protective order from October 11, 2005, until December 11, 2005.

On June 29, 2004, Newman filed a petition seeking court-ordered grandparent visitation, pursuant to Indiana Code section 31-14-5-1(a)(2) because M.S. and K.S.'s parents, Sondhelm and Shirazi, dissolved their marriage in Indiana. Court-ordered mediation took place on October 19, 2004, but was unsuccessful. Between June 29, 2004, and January 26,

2005, two judges recused themselves, and a special judge from Boone County assumed jurisdiction on March 21, 2005.

On February 9, 2006, Shirazi filed a verified motion to quash his testimony subpoena from Newman, which the trial court granted on February 15, 2006. On February 16, 2006, Naomi Tropp and Bev Brown filed motions to quash their testimony subpoenas from Newman, which were both granted on March 1, 2006. On February 28, 2006, Saundra Classick filed a motion to quash her testimony subpoena from Newman, which was granted on March 2, 2006.

The trial court held a hearing on March 3, 2006, and April 3, 2006. The judge interviewed M.S. and K.S in his chambers on April 26, 2006. Newman objected to the interviews. The trial court issued findings of fact and conclusions of law on May 9, 2006, and denied Newman's petition for grandparent visitation. On May 26, 2006, Newman filed a motion to correct error and a verified motion to disqualify the special judge. The trial court denied both motions on June 6, 2006. Newman now appeals.

## DISCUSSION AND DECISION[2]

### I. Grandparent Visitation

[2] In her reply brief, Newman suggests that we should disregard Sondhelm's response brief "as if never filed" because it does not contain a summary of the argument, conclusion, signature block, or signature of counsel and, therefore, violates Indiana Appellate Rule 46. Appellant's Reply Br. p. 3. We initially note that Sondhelm's attorney did sign the response brief, appellee's br. p. 28, and that the appellate rules do not explicitly require a signature block. See Ind. Appellate Rule 46. Newman's request that we completely disregard Sondhelm's response brief is severe, and Newman does not support the harsh remedy with case law or specific appellate rule language. Because Sondhelm's twenty-nine-page response brief conforms to the appellate rules in all other respects, we decline to accept Newman's invitation to disregard it.

By enacting the Grandparent Visitation Act[3] (the Act), our legislature has recognized that "a child's best interest is often served by developing and maintaining contact with his or her grandparents." Swartz v. Swartz, 720 N.E.2d 1219, 1221 (Ind. Ct. App. 1999). However, grandparents "do not have the legal rights or obligations of parents," and "do not possess a constitutional liberty interest in visitation with their grandchildren." Id. at 1221-22. In contrast, parents do have a "constitutionally recognized fundamental right to control the upbringing, education, and religious training of their children." Id. Furthermore, in "our traditions and collective conscience," we have acknowledged that parents "have the right to raise their children as they see fit." Id. Therefore, when it drafted the Act, our legislature had to balance two competing interests: "the rights of parents to raise their children as they see fit and the rights of grandparents to participate in the lives of their grandchildren." Id.

The Act provides that the trial court may grant visitation rights if it determines that "visitation rights are in the best interest of the child." Ind. Code § 31-17-5-2. The determination of the best interests of the child is committed to the sound discretion of the trial court and will be reversed on appeal only upon a showing of an abuse of that discretion. Swartz, 720 N.E.2d at 1221. An abuse of discretion exists where the trial court's decision is clearly against the logic and effects of the facts and circumstances before the trial court or the reasonable, probable deductions to be drawn therefrom. Id. We will not reweigh the evidence nor judge the credibility of the witnesses. Id.

[3] Ind. Code. § 31-17-5-1 to –10.

In Crafton v. Gibson, 752 N.E.2d 78, 98 (Ind. Ct. App. 2001), we ruled on the constitutionality of the Act in light of the United States Supreme Court's plurality opinion in Troxel v. Granville, 530 U.S. 57 (2000). In upholding the Act's constitutionality, we discussed factors courts must take into consideration when determining a child's best interests. First, courts are to "presume that a fit parent's decision is in the best interests of the child." Crafton, 752 N.E.2d at 96 (citing Troxel, 530 U.S. at 69). Acting under this presumption, courts must give special weight to a parent's decision to deny or limit visitation. Troxel, 530 U.S. at 69-70. Second, a court should give some weight to the fact that a parent has agreed to some visitation, if that in fact is the case. Megyese v. Woods, 808 N.E.2d 1208, 1213 (Ind. Ct. App. 2004). Still, while we must presume under Troxel that a fit parent's decision regarding visitation is in the child's best interests, that presumption is rebuttable. Crafton, 752 N.E.2d at 96. "Thus, a grandparent seeking visitation has the burden of rebutting the presumption that a decision made by a fit parent to deny or limit visitation was made in the child's best interest." Id. at 96-97.

II. Freedom of Speech, Free Exercise of Religion, and Freedom of Association

Newman argues that the trial court violated her constitutional rights to freedom of speech, free exercise of religion, and freedom of association as exhibited by the trial court's "personal attacks . . . related to her exercise of the Jewish religion." Appellant's Br. p. 10. Specifically, Newman directs us to the trial court's findings that (1) Newman refers to K.S. as "Daniel" his "'biblical' middle name'" rather than his Iranian-Muslim first name and (2) that Newman has "dogged [the Sondhelms] at their place of worship." Appellant's App. p.

30. The gravamen of Newman's argument is that the trial court hinged its decision on her religious practices and, therefore, violated her constitutionally-protected rights.

We do not deny that the First Amendment to the United States Constitution, which has been extended to the states via the Fourteenth Amendment, provides for the freedom of speech, the free exercise of religion, and the freedom of association. However, the trial court's findings regarding Newman's actions were not an attempt to infringe upon these constitutional rights. The trial court found:

> 24. A glaring example of Beverly Newman's refusal to acknowledge her daughter's authority over the children in question is the fact that Beverly Newman will not call the male child [his given first name]. Beverly Newman insists on calling him "Daniel", his "biblical" middle name. She has insisted on doing this despite repeated requests to call him [his given first name]. [Newman] and her counsel even improperly referred to the child during the trial in this [manner]. Such is inexcusable, and is further evidence of her attempts to dominate and control.
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> 29. Ms. Newman has followed [Sondhelm] and her children to their car on many occasions. She has shadowed or dogged them at their place of worship, on the soccer filed, and has "camped" out at the hospital hoping to see the children.

Appellant's App. p. 30 (emphases added).

By citing Newman's choice to call K.S. "Daniel," the trial court was using Newman's decision as evidence of her refusal to acknowledge Sondhelm's parental authority over K.S. and M.S. The trial court's finding was not an attack on Newman's religion or her religious choices. In fact, it was Newman who cast a religious light on the name. She testified at the hearing that "Danny" is K.S.'s "Hebrew name . . . ." Tr. p. 202. The trial court's reference to "Daniel" as K.S.'s "biblical name" is a direct extension of Newman's own religious classification of the term. Appellant's App. p. 30. Therefore, the trial court did not infringe

on Newman's freedom of speech or religious rights when it made its finding; it merely cited Newman's choice to call K.S. "Daniel" as "[a] glaring example of Beverly Newman's refusal to acknowledge her daughter's authority over the children . . . ." Id.

Newman also argues[4] that the trial court interfered with her free exercise of religion by finding that she "dogged" Sondhelm, M.S., and K.S. at the synagogue that Newman has attended for most of her life. However, the trial court's finding merely alludes to evidence presented at the hearing regarding Newman's actions after the services, specifically her choice to leave unsolicited notes for her grandchildren in Sondhelm's vehicle and to physically hold onto the children after the services to "prolong her contact with them." Tr. p. 352-53. In the same vein as the trial court's citation of Newman's choice to call K.S. "Daniel," the trial court used Newman's post-service actions as support for its finding that she "refuses to accept limits requested by [Sondhelm]" and that "it does not serve the best interests of the children for there to be court-ordered grandparent visitation." Appellant's App. p. 27, 31. The trial court's findings relate to what Newman did while at the synagogue; the findings place no impairment or restrictions on her ability to practice or exercise her religion.

[4] In her reply brief, Newman argues that Sondhelm did not address this argument in her response brief and instead only responded to Newman's argument regarding the trial court's classification of "Daniel" as a biblical name. Newman argues that Sondhelm has not responded to this argument and, therefore, Newman must only show prima facie error on the issue. Hacker v. Holland, 575 N.E.2d 675, 676 (Ind. Ct. App. 1991). However, after directly addressing Newman's previous argument in her brief, Sondhelm states "[l]ikewise, the remainder of Newman's argument in this regard is totally unfounded and deserves no further response." Appellee's Br. p. 12 (emphasis added). While Sondhelm's curt response may not be to Newman's liking, Sondhelm extended her arguments regarding K.S.'s name to Newman's free exercise of religion argument—specifically, the argument that the trial court did not violate Newman's rights by citing her actions as evidence for its ultimate conclusion.

In sum, the trial court was not trying to "dictate or micromanage," appellant's br. p. 11, Newman's actions and it did not infringe upon her constitutionally-protected rights. Instead, the trial court cited Newman's choices as evidence supporting its ultimate conclusion that court-ordered grandparent visitation was not in the best interests of M.S. and K.S. because Newman refuses to accept limits that Sondhelm sets regarding her children. Therefore, we find that Newman's constitutional challenges must fail.

III. Judicial Notice

Newman argues that the trial court improperly took judicial notice of three matters. Specifically, Newman challenges the trial court's decision to take judicial notice of two unrelated lawsuits that Newman has filed and Shirazi's opinion regarding grandparent visitation.

Regarding Shirazi's opinion concerning Newman's visitations with M.S. and K.S., Sondhelm's counsel asked the trial court to "take judicial knowledge of [Shirazi's verified motion to quash his subpoena and motion for protective order and order for attorney's fees], specifically references made by his counsel as to his position with regard to visitation." Tr. p. 444. The trial court responded, "Well, I'll take judicial notice of the pleadings. I'm not going to—I'm not interpreting those as evidence. . . . Any reference as to [Shirazi's] position on the merits of the case, I will not admit this document for that purpose. He's not here. He's chosen not to testify." Id. at 444, 446. Newman directs us to Finding 6:

> 6. Shirazi, the biological father of the two children, did not appear to testify. However, he was deposed on two separate occasions and his depositions were introduced into evidence. Although [he] appears at times to be ambivalent about visitation, he agreed [to it] only if it were supervised visitation. His

> counsel has stated in a filing with this Court that he opposes any visitation sought by [Newman].

Appellant's App. p. 26 (emphasis added).

Newman argues that Finding 6 contradicts the trial court's ruling that it would not interpret Shirazi's pleading as evidence because he chose not to testify at trial. However, as the trial court explicitly states in its findings, it was referencing Shirazi's depositions when it made Finding 6, not his motion. In making the finding, the trial court specifically referenced Shirazi's two depositions, which Newman offered as evidence and the trial court admitted as Exhibit 32. Tr. p. 446-47. While the last sentence of Finding 6 may reference Shirazi's motion—it is unclear exactly what filing the trial court is referring to—we find that any error does not warrant reversal because the basis for the trial court's finding was clearly Shirazi's depositions, which were offered as evidence by Newman.

Newman also argues that the trial court improperly referenced two lawsuits that she brought in unrelated matters: (1) a lawsuit that Newman filed against the JCC in 2005 referenced in Finding 18, and (2) a lawsuit that Newman filed against Marion County officials referenced in Finding 22. The trial court found:

> 18. [Newman] has picketed outside of the Jewish Community Center when her access was denied to an Art Fair where [K.S.] was displaying some artwork. Thereafter, she sued the Jewish Community Center for events which are related to this case when her access to certain areas . . . was denied. Beverly Newman is not even a member of the Jewish Community Center, but she insisted on going there and being in places where she was not welcome. Beverly Newman has also sought a protective order against Jeff Sondhelm, the children's step-father, alleging abuse and threats against her, which Jeff Sondhelm has denied under oath.
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> 22. Julie testified that she is afraid to be around her mother for fear that her mother will raise new complaints against her husband or make allegations

> against anyone else who stands in her way. This pattern of behavior is not new for Beverly Newman. In the past, when she attempted to adopt children from Maryland, (in a matter totally unrelated to this matter) she was unsuccessful and then spent a considerable amount of time and effort suing lawyers, judges, [and] the Department of Family & Children in both Indiana and Maryland. None of these were met with any success.

Appellant's App. p. 28-29.

It is true that a trial court generally may not take judicial notice of a different proceeding, even if it is before the same court in a related matter. Kennedy v. Jester, 700 N.E.2d 1170, 1173 (Ind. Ct. App. 1998). In Kennedy, we stated that the general rule against judicial notice of other proceedings "is designed to ensure that the facts alleged are indeed truly fact, not mere allegations." Id. The court went on:

> Here, however, Appellants' counsel acknowledged to the trial court that Jester's criminal appeal was pending at the time of the final hearing. Accordingly, the evil the rule is designed to prevent has been fully protected against as Appellants themselves have admitted the fact judicially noticed. Therefore, we find no reversible error.

Id.

At the hearing, Newman testified that she had filed the lawsuits referenced in Findings 18 and 22 and acknowledged that she was unsuccessful in each. Tr. p. 217-22. Therefore, the "evil the rule is designed to prevent has been fully protected against . . ." because Newman admitted to filing the lawsuits. Kennedy, 700 N.E.2d at 1173. For that reason, as did the Kennedy court, we do not find the trial court's references to Newman's other lawsuits to be reversible error.

## IV. Findings of Fact and Best Interests of M.S. and K.S.

The essence of Newman's argument is that the trial court made findings of fact that were unsupported by the evidence; therefore, its decision to deny Newman court-ordered visitation time with M.S. and K.S. was erroneous. See Appellant's Br. p. 13-35. Newman specifically attacks twenty of the thirty-four trial court findings.

A. Findings of Fact

Newman first directs us to Findings 8, 11, 19, 22, 23, 25, and 27 and argues that they are improper because they contain language such as "[s]he testified that . . ." or "[a]ccording to [the witness] . . . ." Appellant's App. p. 27, 28. Newman cites In re Adoption of T.J.F., which held that a trial court cannot simply recite testimony presented at a hearing and find it to be fact. 798 N.E.2d 867, 874 (Ind. Ct. App. 2003). "[T]he trier of fact must find that what the witness testified to is the fact." Id.

While the language that Newman directs us to is relevant, the T.J.F. court noted that the rationale for the specific findings requirement is for the parties to understand the evidentiary basis upon which the trial court's decision rests so that the parties are "enabled to formulate intelligent and specific arguments on review." Id. As we have previously held in another grandparent-visitation case, "[t]he purpose of findings of fact and conclusions of law is to provide the parties and reviewing courts with the theory upon which the case was decided." McCune v. Frey, 783 N.E.2d 752, 757 (Ind. Ct. App. 2003).

Here, the trial court made detailed findings in its eight-page order regarding both the history between Sondhelm and Newman and Newman's interactions with M.S., K.S., and the Sondhelm family. The language that Newman complains of, mainly "[s]he testified that . . ." or "[a]ccording to . . . ," is followed by the trial court's summation of the testimony and the

findings that the trial court reached based on the that evidence. Appellant's App. p. 27, 28. The trial court did not directly quote testimony and reach impulsive conclusions. Instead, it appears that the trial court carefully weighed the evidence presented at the hearing and summarized specific testimony, with language such as "[s]he testified that . . . ," to support its ultimate conclusion that court-ordered grandparent visitation was not in the grandchildren's best interests. On appeal, Newman does not argue that the trial court's findings were vague, that they did not shed light on its decision-making process, or that they hindered the formulation of her fifty-one-page appellate brief or her twenty-six-page reply brief. In essence, Newman asks us to dismiss seven findings because she disagrees with the wording that the trial court used to support its findings. We decline this invitation.

Newman also challenges Findings 8, 9, 15, 16, 17, 18, 19, 21, 24, 26, 27, 28, 29, 31, 32, and 33 and argues that these findings are not supported by the evidence presented at the hearing and, therefore, are clearly erroneous. See Appellant's Br. p. 20-31. When the trial court finds facts and states its conclusions pursuant to Indiana Trial Rule 52, we will not set aside the findings or judgment unless clearly erroneous. Woodruff v. Klein, 762 N.E.2d 223, 226-27 (Ind. Ct. App. 2002). In applying a two-tiered standard of review, we "'determine whether the evidence supports the findings and the findings support the judgment.' In deference to the trial court's proximity to the issues, 'we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment.'" Id. at 227. We do not reweigh the evidence or determine the credibility of witnesses. Id. Instead, we consider the evidence most favorable to the judgment, with all reasonable inferences drawn in favor of the judgment. Id.

The majority of Newman's argument regarding these sixteen trial court findings primarily focuses on her belief that the trial court was biased against her when it made its decision. She repeatedly challenges the trial court's word choices and its characterization of her relationship with Sondhelm, M.S., and K.S. Newman stresses that these alleged mischaracterizations prove that the trial court was biased against her. See, e.g., Appellant's Br. p. 20-26, 27, 30 (regarding Findings 8, 15, 19, 24, 26, 29, 31). We will address any potential trial court bias later in this decision. See infra Part VII. The remainder of Newman's argument asks us to reweigh the evidence or determine the credibility of witnesses, a practice in which we do not engage upon appeal. Woodruff, 762 N.E.2d at 227. Therefore, we do not find the trial court's findings to be clearly erroneous.

B. Best Interests of M.S. and K.S.

Newman argues that the trial court erroneously focused on her and Sondhelm's relationship when it concluded that court-ordered grandparent visitation would not be in the best interests of M.S. and K.S. Specifically, Newman argues that the trial court should have focused more on her relationship with M.S. and K.S. in making its determination.

As noted above, the trial court may order grandparent visitation if it determines that "visitation rights are in the best interest of the child." I.C. § 31-17-5-2. We are to "presume that a fit parent's decision is in the best interests of the child." Crafton, 752 N.E.2d at 96 (citing Troxel, 530 U.S. at 69). Acting under this presumption, we must give special weight to a parent's decision to deny or limit visitation. Troxel, 530 U.S. at 69-70. The determination of the best interests of the child is committed to the sound discretion of the

trial court and will be reversed on appeal only upon a showing of an abuse of that discretion. Swartz, 720 N.E.2d at 1221.

Newman's argument[5] is very similar to the argument raised by the grandmother in Kennedy v. Kennedy, 688 N.E.2d 1264, 1269-70 (Ind. Ct. App. 1997). In Kennedy, the trial court denied the grandmother court-ordered visitation with her grandchild primarily because of the "dysfunctional relationship" it found between the grandmother and her son. Id. at 1269. On appeal, the grandmother argued that the trial court should have focused more on her relationship with her grandchild and less on her strained relationship with her son. Id. We held:

> That focus [on the relationship between the grandparent and the grandchild], however, is the starting point, not the ending one, in the trial court's best interest analysis. The ultimate question is whether visitation in the face of family discord is in the child's best interest. That question can only be answered by looking at the totality of the circumstances presented. While the relationship may, in any given case, be sufficient to make grandparent visitation in the child's best interest, notwithstanding the dissension between the parent and grandparent, it may not be sufficient to overcome the effects of the discord on the child in another.
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> From this evidence, the trial court could have properly concluded that the acrimony between Father and Grandmother was unhealthy for [the grandchild], regardless of the meaningful contact that he may have had with Grandmother in the past. Considering the totality of the circumstances, the court did not abuse its discretion when it denied Grandmother visitation rights.

Id. at 1269-70 (emphases added).

Here, as in Kennedy, it was proper for the trial court to ultimately determine whether court-ordered visitation with Newman, in the face of family discord, was in M.S. and K.S.'s

best interests. Therefore, it was proper for the trial court to elaborate on Newman and Sondhelm's "tumultuous at best" relationship[6] when determining what was in M.S. and K.S.'s best interests. Appellant's App. p. 27. In light of the bitterness, animosity, and acrimony between Newman and Sondhelm—regardless of any limited, meaningful contact Newman may have had with M.S. and K.S.—we cannot conclude that the trial court abused its discretion by focusing on Newman and Sondhelm's relationship and determining that court-ordered grandparent visitation would not be in the children's best interests.

## V. Quashed Subpoenas and Admitted Exhibits

### A. Quashed Subpoenas

Newman argues that the trial court erroneously quashed four witness subpoenas and that the testimony of those witnesses was relevant and material to the cause. Indiana Rule of Trial Procedure 45(B) provides that the trial court may "quash or modify the subpoena if it is unreasonable and oppressive." We will reverse a trial court's decision to quash a subpoena if the trial court abuses its discretion. Strodtman v. Integrity Builders, Inc., 668 N.E.2d 279, 286 (Ind. Ct. App. 1996). In determining whether evidentiary error requires reversal, we assess the probable impact upon the trier of fact. Apter v. Ross, 781 N.E.2d 744, 759 (Ind. Ct. App. 2003).

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[5] Newman admits that she "has never tried to establish that [Sondhelm] was an unfit parent." Appellant's Br. p. 26 n.5. Therefore, we are to presume that Sondhelm's decision to deny Newman visitation time is in the best interests of M.S. and K.S.

[6] Newman argues that she presented evidence that her relationship with Sondhelm has been, at times, positive. While this may be true, evidence was also presented that the relationship has been extremely turbulent. As the reviewing court, we will not reweigh the evidence presented at the hearing. Swartz, 720 N.E.2d at 1221.

We initially note that sixteen witnesses testified at the grandparent-visitation hearing, including Newman, Sondhelm, and Jeff. Newman first argues that the trial court erred by quashing Shirazi's subpoena because he was the biological father of M.S. and K.S., his testimony would have been relevant, and Shirazi's testimony may have supported Newman's desired relief. However, Newman had already deposed Shirazi twice, both depositions were admitted as evidence at the hearing, and Shirazi was living in California at the time of the hearing. Ex. 32. Therefore, we do not find that the trial court abused its discretion when it quashed Shirazi's subpoena.

Newman also argues that the trial court erred when it quashed the subpoenas of Brown and Tropp, two JCC employees who are defendants in Newman's tort lawsuit against the JCC. We first note that Newman does not cogently argue how either Brown or Tropp would have provided relevant testimony. And, as Brown and Tropp both argued in their motions,

> Newman is represented by the same attorney in the civil tort action as represents her in this visitation case. This presents the peculiar (and admittedly rare) situation where Bev Brown [and Tropp] will be exposed to examination by an attorney who is prosecuting a tort case against [them] without the benefit of legal representation, as [they are] not [parties] in this matter.

Appellant's App. p. 198, 202. We find that the trial court did not abuse its discretion by granting Brown and Tropp's motions to quash in light of the rare situation and the vagueness surrounding any potential relevancy of their testimony.

Finally, Newman argues that the trial court erred when it granted Classick's motion to quash. Classick was an employee of the St. Vincent Hospital where Sondhelm's fourth child was born in 2003. Newman argues that Classick "could have testified that Dr. Newman had

not 'camped out' at the hospital . . ." as the trial court noted in Finding 27. Appellant's Br. p. 38 (emphasis in original). In her motion to quash, Classick stated that she "has no independent knowledge concerning [M.S.] and/or [K.S. or] . . . Sondhelm" and that she "has no specific, independent recollection of Beverly Newman . . . ." Appellant's App. p. 236. Newman's speculation as to how Classick could have testified does not warrant a finding that the trial court abused its discretion when it quashed Classick's subpoena, especially considering that Classick filed the motion to quash because she had no independent recollection of M.S., K.S., Sondhelm, or Newman. Therefore, we find that the trial court did not abuse its discretion by granting Classick's motion to quash.

B. Admitted Exhibits

Newman argues that Exhibits K and N were summaries of Sondhelm's testimony and should not have been admitted over Newman's objection at the hearing. We initially note that the admission or exclusion of evidence is a determination entrusted to the discretion of the trial court, and we will reverse a trial court's decision only when the court has abused its discretion. Lachenman v. Stice, 838 N.E.2d 451, 464 (Ind. Ct. App. 2005), trans. denied.

Exhibit K is a timeline Sondhelm prepared regarding events relevant to Newman's action. Upon admission over Newman's objection, the trial court ruled "for purposes of summary, it's admitted over objection subject to cross examination. . . . And for nothing more, I'll consider it as demonstrative evidence." Tr. p. 286. Demonstrative evidence is evidence offered for the purposes of illustration and clarification. Pilkington v. Hendricks County Rural Elec. Membership Corp., 460 N.E.2d 1000, 1010 (Ind. Ct. App. 1984). The theory justifying the admission of demonstrative evidence "requires only that the item be

sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact." Id. Upon admission of Exhibit K, the trial court explicitly stated that it would only be considered as demonstrative evidence. A timeline of events relevant to Newman's action was illustrative of relevant testimony, helpful to the trier of fact, and, therefore, admissible as demonstrative evidence. Id.

Newman also argues that the trial court erred by admitting Exhibit N, a two-page summary of Sondhelm's concerns regarding Newman's visitation with M.S. and K.S. We initially note that Sondhelm disclosed the summary with Newman during discovery. Tr. p. 362. The trial court admitted Exhibit N over Newman's objection "[t]o the extent that, in reviewing my notes and making a decision on this case, if I don't match these statements up with some evidentiary testimony, then I will tell you I will ignore it . . . [it is admitted as a] summary only, subject to cross." Id. at 364. While the trial court did not explicitly term Exhibit N "demonstrative evidence," we find that the trial court's rationale for admitting Exhibit N was similar to its rationale for admitting Exhibit K. Therefore, because Exhibit N was a summary of Sondhelm's testimony, helpful to the trier of fact, and the trial court stated that it would ignore parts that were unsupported by evidentiary testimony, we find that the trial court did not abuse its discretion by admitting Exhibit N.

## VI. Ex Parte Communication

Newman argues that the trial court erred by engaging in ex parte communication with Sondhelm before it conducted in camera interviews with M.S. and K.S. Newman does not appeal the in camera interviews, appellant's reply br. p. 20; instead, she argues that there was ex parte communication between Sondhelm and the trial court before the interviews that

prejudiced Newman. Newman claims that Sondhelm told the trial court, "It will only be [M.S.]. [K.S.] doesn't want to." Appellant's Br. p. 41. Although there is no evidence to suggest that the trial court did not interview both of the children, Newman claims that she was prejudiced because the trial court did not spend as much time interviewing K.S. because of Sondhelm's comment.

Newman does not cite to the record to support her claim regarding Sondhelm's alleged communication. Newman cites to Canon 3(B)(8) of the Code of Judicial Conduct:

> a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications . . . except . . . ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized [if] the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

Sondhelm does not admit to the alleged communication and, instead, argues that any communication on her part with the trial court was entirely "for administrative purposes to facilitate interviewing the children." Appellee's Br. p. 24. Because Newman cannot support her claim that any communication between Sondhelm and the trial court was substantive and prejudicial, we must agree with Sondhelm and find that any communication was de minimus and administrative in nature. Therefore, the communication does not raise an inference of impropriety. See Sylvester v. State, 698 N.E.2d 1126, 1129 n.2 (Ind. 1998) (holding that any communication between the trial court and the attorney regarding trial scheduling "would merely be administrative and would thus fall under the exception to Indiana Judicial Conduct Canon 3(B)(8)").

## VII. Trial Court Bias

As we mentioned in Part IV.A, Newman believes that the trial court was biased against her and that its bias ultimately affected the outcome of the case. While Newman does not challenge the trial court's partiality prior to or during the hearing, appellant's br. p. 50, she extensively cites language from the trial court's order to support her contention that it was biased against her.

A party's success on a claim of bias and prejudice depends on its ability to make a plain showing that unfairness and prejudice existed and controlled the result. Chance v. Chance, 400 N.E.2d 1207, 1212 (Ind. Ct. App. 1980). After immersing ourselves in the record before us on appeal, we find that the trial court's findings do not suggest partiality and are, instead, based on evidence presented at the hearing. It seems that Newman argues that the trial court was biased simply because she does not agree with its findings or its ultimate conclusion. However, Newman's disagreement with the trial court's word choice and its characterization of her familial situation does not prove her bias claim. In fact, the trial court noted the respect that it had for Newman in its findings, even though it ultimately ruled against her:

> 31. Ms. Newman was the founder of the very prestigious GAGE Institute in Indianapolis. She has been on the forefront of education in the Indianapolis area for many years. This decision of this Court is in no way intended to minimize the significance and critical contributions that she has made to her daughter, Ms. Sondhelm, nor the contributions that she has made to her community and the many young people that she has touched in a very positive way. There is no doubt in the Court's mind that she is a caring, doting, loving, grandmother. However, there is equally no doubt in the Court's mind that ordering or requiring visitation between [Newman] and the grandchildren would not be in the children's best interest . . . .

Id. at 31. Therefore, Newman's bias claim must fail because she cannot show that unfairness and prejudice existed and controlled the result. Chance, 400 N.E.2d at 1212.

## VIII. Attorney's Fees

On cross-appeal, Sondhelm argues that the trial court erred when it denied her request for attorney's fees. Specifically, Sondhelm contends that the trial court had the authority to award her attorney's fees under Indiana Code section 31-17-7-1 and that it erred by not doing so because it explicitly mentioned its desire to award her attorney's fees:

> 2. The Court finds that it has no authority to order [Newman] to pay a portion of Ms. Sondhelm's attorneys' fees. The Grandparent Visitation Statute contains no specific provision authorizing attorney's fees in an action filed pursuant to this chapter, Johnson v. Sprague, 614 N.E.2d 585, 590 (Ind. Ct. App. 1993). In addition, in Swartz v. Swartz, 720 N.E.2d 1219 (Ind. Ct. App. 1999), the Court held that the trial court abused its discretion in ordering a mother to pay grandparent's attorney fee without any statutory basis or agreement of the parties.
>
> 3. If the Court were able to order [Newman] to pay a portion of Ms. Sondhelm's attorney fees, it would do so. While certainly having the right to bring such action, [Newman] has litigated this matter fiercely, to say the least, and has sought numerous third party involvement, including subpoenas, Motion to Quash Subpoenas and has, from the Court's perspective[,] attempted to transform this case into either a modification of custody proceeding or a referendum on Ms. Sondhelm or a vindication of [Newman]. Ms. Sondhelm has incurred significant attorney fees that she would be entitled to reimbursement for, if there was statutory or case law for such.

Appellant's App. p. 31-32.

Indiana follows the American Rule that ordinarily requires each party to pay their own attorney's fees. Salcedo v. Toepp, 696 N.E.2d 426, 435 (Ind. Ct. App. 1998). Generally, attorney's fees are not recoverable from the opposing party as costs, damages, or otherwise, in the absence of an agreement between the parties, statutory authority, or rule to the

contrary. City of Hammond v. Marina Entm't Complex, Inc., 681 N.E.2d 1139, 1142 (Ind. Ct. App. 1997). Indiana Code section 31-17-7-1, which is the is the "Costs and Attorney's Fees" section of the "Family Law: Custody and Visitation" article, provides:

> The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under IC [§§] 31-17-2, IC 31-17-4, IC 31-17-6, or this chapter and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment.

I.C. § 31-17-7-1. The Grandparent Visitation Act, Indiana Code chapter 31-17-5, is not listed in section 31-17-7-1.

Newman argues that the trial court did not have the statutory authority to award Sondhelm attorney's fees under section 31-17-7-1. After analyzing the language of this section and in light of language from Schwartz, we must agree. See Schwartz, 720 N.E.2d at 1223 (holding that trial court abused its discretion when it awarded grandmother attorney's fees when trial court "did not identify a statutory basis for its award, nor do we find any statute applicable under these circumstances"). Therefore, the trial court correctly declined to award Sondhelm attorney's fees under section 31-17-7-1, and Sondhelm has not directed us to other applicable statutory authority.

Sondhelm next cites the common law "obdurate behavior exception," which provides that a trial court may award attorney's fees where a party has acted in bad faith. Johnson, 614 N.E.2d at 590. To qualify as obdurate behavior, the conduct must be vexatious and oppressive in the extreme, and the exception is limited to circumstances in which the respondent must defend against a baseless claim. Id. Sondhelm argues that the trial court

should have awarded her attorney's fees under the obdurate behavior exception because it found that Newman "has litigated this matter fiercely, to say the least . . . Sondhelm has incurred significant attorney fees that she would be entitled to reimbursement for, if there was statutory or case law for such." Appellant's App. p. 31. However, the trial court explicitly noted in its order that Newman's claim was not baseless, and it did not unequivocally find that Newman acted in a vexatious nature. Therefore, we decline to reverse the trial court's decision to deny Sondhelm's request for attorney's fees.

## IX. Appellate Attorney's Fees

Sondhelm requests appellate attorney's fees under Indiana Appellate Rule 66(E), which provides that our court may award a party attorney's fees if an appeal is frivolous or brought in bad faith. Specifically, Sondhelm argues that Newman made numerous frivolous arguments that were made in bad faith.

To prevail on a substantive bad faith claim and receive attorney's fees, the party must show that the appellant's contentions and arguments are devoid of all plausibility. Shepherd v. Truex, 819 N.E.2d 457, 464 (Ind. Ct. App. 2004). While Newman has vigorously argued numerous claims upon appeal, we find that her claims were colorable and were not made in bad faith or with a vexatious nature. Therefore, we decline Sondhelm's request for appellate attorney's fees.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.